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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 88

B. H. NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 14–16) is reported at 220 F. 2d 289.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1955 (Pet. 14), and a petition for rehearing was denied on April 21, 1955 (Pet. 2). The petition for a writ of certiorari was filed on May 19, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the charge to the jury contained errors so prejudicial as to require reversal of the conviction, although no objections were made as required by Rule 30, F. R. Crim P.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 30 in part provides:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52 (b):—*Plain Error.*

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

The petitioner and five others were tried on a nineteen-count indictment charging in count one a conspiracy to violate the internal revenue laws pertaining to distilled whiskey (R. 1–10), and in the other counts substantive offenses (R. 10–17). The conspiracy charged was the production in unregistered stills of spirituous liquors, upon which no tax was paid, and their transportation and concealment in violation of the internal revenue laws. The substantive charges which re-

lated to petitioner concerned the removal and concealment of distilled spirits in violation of 26 U. S. C. 3321 (R. 14–17). The jury found the petitioner guilty of counts one, thirteen, eighteen, and nineteen (R. 17). The court gave the petitioner a general sentence of two years on counts one, thirteen, and eighteen and dismissed count nineteen (R. 21). On appeal the conviction was affirmed (Pet. 16).

The evidence may be summarized as follows:

William Williford testified that he was employed by Tyler Briggs and in May, 1952, was arrested at an illicit distillery. After this arrest, he agreed to report to Federal officers his future activities in connection with illegal whiskey (R. 63, 64). About a month after his arrest he resumed work for Tyler Briggs and began hauling whiskey for him (R. 67). Williford identified the petitioner in court [1] as the man who furnished him with a truck in which to haul the illicit whiskey (R. 72–73), and who helped him unload it from

[1] Relative to identification of petitioner by Williford, the following took place in court (R. 73–74):

Q. Do you see B. H. Newman in the Court room?

A. Yes, sir.

Q. Which one is he?

A. The white fellow sitting side of the colored boy over there.

The COURT. Let him stand up.

Note: Person standing.

The COURT. That's him.

Q. You identify the defendant, B. H. Newman, there?

A. Yes, sir.

the truck into the cars of the petitioner and others (R. 75–78). On cross-examination, Williford admitted he was a "stool pigeon" (R. 81) in the employ of the United States Government. He gave conflicting evidence as to his remuneration in that he first said he was paid all at one time (R. 83) and later that he was paid a weekly allowance (R. 83) and received two checks at different times (R. 84). He admitted that he had a criminal record (R. 84–85) and a dishonorable discharge from the United States Army (R. 85).

Additional evidence implicating the petitioner was given by a car salesman who testified that he sold petitioner a 1939 Chevrolet panel truck, Motor Number 2524250 (R. 98), and by a deputy sheriff who testified that he seized the same truck ten days after the sale while it was being used to haul 72 gallons of untaxed whiskey (R. 96–97).

Ward, a Government witness, stated that he purchased illegal whiskey in 1952 from a B. H. Newman, whom he contacted by looking up his name in the telephone directory (R. 103). Although Ward refused to identify petitioner in court (R. 103), the Government introduced a 1952 telephone directory which showed only one listing of a B. H. Newman, residing at the address of the petitioner (R. 117).

The petitioner denied having taken any part in the acts charged in the indictment (R. 136). He introduced evidence that he was in the trucking and used car business (R. 127) and an unrecorded

bill of sale with respect to the truck referred to above purporting to show a sale two days before it was seized by the deputy sheriff (R. 132). While the petitioner was on the stand, the Government introduced evidence of two prior convictions for violating the internal revenue liquor laws (R. 141–146).

In the course of the judge's charge to the jury he outlined the specific counts in which each defendant was charged (R. 171–172); explained that the jury was the exclusive judge of the evidence and the credibility of witnesses and that they should take into account the demeanor of the witnesses upon the stand and their interest in the case (R. 173); and defined and illustrated a conspiracy (R. 173–175). He began an explanation of impeachment by prior conviction relative to petitioner and included in his charge an explanation of impeachment of a witness by general bad character, contradictory statements and disproof of facts testified to by him (R. 175–176). The aforementioned portion of the charge he withdrew as not applicable (R. 176). He then recharged that whether the petitioner was impeached by the evidence of his prior convictions, introduced solely to impeach him, was a question of fact for the jury (R. 177).[2] Later, upon re-

[2] "Well, gentlemen, as I stated, just disregard what I said just now relative to impeachment, because I don't think it would be applicable in this case. He hasn't got the decision that he had here yesterday. However, that

quest of the petitioner's counsel (R. 181) the judge recharged the jury that the impeachment charge applied also to the witness Williford (R. 182). In explaining the form of the verdict to the jury, the judge said (R. 178–179):

> * * * There are nineteen counts in this indictment, nineteen different offenses alleged in this indictment. The first is the conspiracy count, and the others are overt acts. You can find either one of these five defendants, or all of these five defendants guilty on all counts, or not guilty on all counts. You can find some of the defendants guilty on some counts and some of the defendants not guilty on some of the counts. If you find all the defendants not guilty on all counts you should so state that in your verdict. If you find some of the defendants guilty on some counts and some of the defendants not guilty on some of the other counts you should so state it in your verdict. But, gentlemen, if, under the evi-

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indictment that was introduced by the government was simply for the purpose of impeachment, and it was admitted solely on the question of impeachment. I do not say that he has been impeached by that indictment in a former case. That is a question for you to determine as to whether or not he has been successfully impeached. That indictment and former conviction or plea of guilty was admitted solely as to the defendant, B. H. Newman, and was admitted solely for the purpose of impeachment of the defendant, Newman, and it is solely a question for the jury as to whether or not he has been successfully impeached. It is solely a question of fact for the jury to determine as to whether or not he has been impeached." (R. 177.)

dence, you find all the defendants guilty on all counts your verdict should so state likewise. * * *

Other than the request relative to having the impeachment charge applied to Williford, the defense counsel made no objections to the charge.

ARGUMENT

1. The petitioner's attack upon the sufficiency of the evidence presents no issue for review by this Court. Ample evidence to support the verdict appears throughout the record. (R. 62–80, 98–99, 100–105, 116–118).

Because the Government witness Williford, who testified against the petitioner, had a criminal record, was a paid agent of the Government, and made inconsistent statements relative to how he was paid, the petitioner urges that the testimony was insufficient to go to the jury (Pet. 8, 9). These factors, however, all went to Williford's credibility and it was for the jury, not the court, to believe or disbelieve him. Cases cited by the petitioner in support of his contention were not jury trials and thus are not in point (Pet. 8–9). Credibility of a witness being peculiarly a jury issue presents nothing for appellate review. Even though it is established that a conviction may rest on the uncorroborated testimony of an accomplice, in this case there was, as shown in the Statement, corroborating testimony. *United*

States v. *Karavias,* 170 F. 2d 968 (C. A. 7).

The record (R. 73) belies the petitioner's statement that the court identified the petitioner for Williford (Pet. 9). It was after Williford had pointed out the petitioner (R. 73), that the court had him stand up (R. 74) and commented, "That's him". (See fn. 1 *supra,* p. 3.)

2. No objections to the alleged errors in the charge to the jury, now urged on appeal, were made during the trial as required by Rule 30, F. R. Crim. P. It is therefore necessary that petitioner show not only error, but an effect upon substantial rights, in order to require reversal under Rule 52 (b), F. R. Crim. P. See *Fischer* v. *United States,* 212 F. 2d 441 (C. A. 10).

Petitioner received a general sentence of two years on all the counts upon which he was sentenced (R. 20). Since the charge on the conspiracy count was ample and that count alone supports the sentence, the alleged failure to instruct the jury as to the nature of the substantive counts is immaterial. Furthermore the jury was given a copy of the indictment (R. 170, 180). The language of counts thirteen and eighteen, "unlawfully, wilfully and knowingly remove and conceal distilled spirits, to wit: * * * gallons, with intent to defraud the United States of the tax on the spirits removed and concealed by them" (R. 14, 16) does not appear to need further explanation in order for the jury to deter-

mine the petitioner's guilt or innocence as to them.

The petitioner also attacks at this time that portion of the charge wherein the judge said the jury could convict all defendants on all counts (R. 178), and that there were nineteen different offenses alleged in the indictment, the first for conspiracy and the rest for overt acts (R. 178) (Pet. 11). The judge had already specified which counts applied to the petitioner (R. 171) and was merely explaining the form of the verdict when he made the statement. The selectivity of the jury's verdict finding the petitioner guilty only on some of the substantive counts shows that the jury were not confused.

The petitioner's contention that the charge as to impeachment was confusing and gave the jury no standard by which to determine whether or not the witness was impeached (Pet. 9–10) is not well founded. The judge instructed the jury that it was for them to decide whether or not petitioner's prior convictions impeached him (R. 177). Upon request, this instruction was also applied to the Government witness Williford (R. 182). Although that portion of the charge relative to impeachment by general bad character, conflicting statements, and disproof of facts had been withdrawn as not applicable (R. 176), the judge had already charged that the jury was the exclusive judge of credibility of witnesses and that they should take into consideration the witnesses' demeanor on the stand and their interest

in the case (R. 173). Thus the charge in its entirely was sufficiently explained as to impeachment of Williford.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ISABELLE CAPPELLO,
Attorneys.

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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

No. 88

OCTOBER TERM, 1955

B. H. NEWMAN,
Petitioner

vs.

UNITED STATES OF AMERICA

Petition for Rehearing of Order on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

T. REUBEN BURNSIDE
Attorney for Petitioner
P. O. Box 247
Thomson, Georgia

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 88

B. H. Newman, Petitioner

vs.

United States of America

Petition for Rehearing of Order on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF T. REUBEN BURNSIDE, ATTORNEY FOR PETITIONER, B. H. NEWMAN

The petition of B. H. Newman for rehearing of order on his petition for the writ of certiorari in the above stated case respectfully shows:

1. That on October 10, 1955, this Court denied his petition for certiorari to the United States Court of Appeals for the Fifth Circuit.

2. That petitioner was convicted on count 1 (conspiracy count), and on substantive counts 13 and 18

of the liquor indictment, in the United States District Court for the Southern District of Georgia, Augusta Division. (count 19 on which he also was convicted was dismissed by the Judge in imposing sentence).

3. That the verdict of the jury convicting petitioner as aforesaid was returned on April 14, 1954, and petitioner was sentenced to serve a term of two years in custody of the Attorney General.

4. That the trial Judge failed to give in charge to the jury the law with reference to substantive counts 13 and 18 of the indictment, failed to define the offenses therein charged, or the elements of either.

5. That the conviction of petitioner on substantive counts 13 and 18 of the indictment, in view of the trial Judge's failure to charge the law with reference to said counts as aforesaid, was in violation of the 5th Amendment of the Constitution of the United States, in that petitioner was thereby deprived without due process of law, of his personal right not to be convicted by the jury which had heard no definition of said offenses, no explanation thereof, and no charge whatsoever with reference to said offenses contained in substantive counts 13 and 18 on which the jury found petitioner guilty; that the trial was not according to established procedure. (Simons v. U. S., 119 F.2d 539, certiorari denied, 314 U. S. 616).

6. That petitioner's conviction of substantive counts 13 and 18 of the indictment, in view of the trial Judge's failure to charge the jury as hereinabove shown, was in violation of the 6th Amendment of the Constitution of the United States, in that petitioner was thereby deprived of his right to a "fair trial" as quaranteed thereunder because each count constitutes a separate offense and petitioner had the right not to be improperly branded by an unauthorized verdict of guilty on said substantive counts, regardless of the

sentence imposed. (Miller v. U. S., 120 F. 2d 968).

7. That while petitioner previously presented to this Court the point that the trial Court erred in failing to give in charge to the jury the law relative to said substantive counts, nevertheless, petitioner did not present to this Court the question that his conviction on said substantive counts, in view of said failure to charge, was in violation of the 5th and 6th Amendments of the Constitution of the United States.

Wherefore, petitioner prays:

(a) That he be granted a rehearing by this Court of the order on his petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit;

(b) That this Court adjudge that his conviction on substantive counts 13 and 18 of the indictment was in violation of the 5th and 6th Amendments of the Constitution of the United States for the reasons hereinabove shown, in that he was thereby deprived, without due process of law, of his Constitutional right to a fail trial;

(c) That the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and that petitioner be granted a new trial.

T. REUBEN BURNSIDE
ATTORNEY FOR PETITIONER

Address:
P. O. Box 247
Thomson, Georgia

I, T. Reuben Burnside, attorney for petitioner in the above and foregoing petition for rehearing, hereby certify that said petition for rehearing is presented in good faith and not for delay; and I further certify that said petition is restricted to the substantial grounds available to petitioner, although not previously presented, that petitioner's conviction on counts 13 and 18 of the indictment, in view of the trial Judge's failure to charge the law relative to same, was in violation of the 5th and 6th Amendments of the Constitution of the United States in that petitioner was thereby deprived, without due process of law, of his right to a fair trial; and that said specific questions were not previously presented to this Court although petitioner did previously present to this Court the objection that the trial Judge erred in not charging the law relative to said counts 13 and 18. This certificate is made in compliance with Rule 58(2).

T. REUBEN BURNSIDE
ATTORNEY FOR PETITIONER

I, T. Reuben Burnside, attorney for petitioner in the above and foregoing petition for rehearing, hereby certify that I have this day served said petition, with certificate under Rule 58(2) attached, on Hon. William C. Calhoun, United States Attorney for the Southern District of Georgia, and attorney of record for Respondent in said case, by depositing a copy of same in the United States post office at Thomson, Georgia, with first class postage prepaid, addressed to him at his post office address, Federal Building, Augusta, Georgia;

And I further certify that I have this day served said petition for rehearing, with said certificate attached, on the Solicitor General of the United States by depositing a copy of same in the United States post office at Thomson, Georgia, with first class air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

This the_____day of October, 1955.

T. REUBEN BURNSIDE
ATTORNEY FOR PETITIONER